No. 00-1898

In the Supreme Court of the United States

TANYA ENGLISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in supervising the government employee who committed the assault or battery.

2. Whether under Virginia law the government had a duty to prevent an off-duty service member, who was not on military premises, from committing a battery upon the plaintiff.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bembenista v. *United States*, 866 F.2d 493 (D.C. Cir. 1989)	6
Bennett v. *United States*, 803 F.2d 1502 (9th Cir. 1986)	6
Billingsley v. *United States*, 251 F.3d 696 (8th Cir. 2001)	5
Brock v. *United States*, 64 F.3d 1421 (9th Cir. 1995)	6
Chesapeake & Potomac Tel. Co. v. *Dowdy*, 365 S.E.2d 751 (Va. 1988)	8
Doe v. *United States*, 838 F.2d 220 (7th Cir. 1988)	6-7
Fox v. *Custis*, 372 S.E.2d 373 (Va. 1988)	8
Franklin v. *United States*, 992 F.2d 1492 (10th Cir. 1993)	5
Garcia v. *United States*, 776 F.2d 116 (5th Cir. 1985)	6
Guccione v. *United States*, 847 F.2d 1031 (2d Cir. 1988), cert. denied, 493 U.S. 1020 (1990)	5
Hoot v. *United States*, 790 F.2d 836 (10th Cir. 1986)	6
Johnson v. *United States*, 788 F.2d 845 (2d Cir.), cert. denied, 479 U.S. 914 (1986)	6
Leleux v. *United States*, 178 F.3d 750 (5th Cir. 1999)	5

Cases—Continued:	Page
Marshall v. *Winston*, 389 S.E.2d 902 (Va. 1990)	7
Metz v. *United States*, 788 F.2d 1528 (11th Cir.), cert. denied, 479 U.S. 930 (1986)	6
Nasser v. *Parker*, 455 S.E.2d 502 (Va. 1995)	8
Perkins v. *United States*, 55 F.3d 910 (4th Cir. 1995)	5
Propper v. *Clark*, 337 U.S. 472 (1949)	8
Senger v. *United States*, 103 F.3d 1437 (9th Cir. 1996)	6
Sheridan v. *United States*, 487 U.S. 392 (1988)	3, 4
Thigpen v. *United States*, 800 F.2d 393 (4th Cir. 1986)	5
UNUM Life Ins. Co. of Am. v. *Ward*, 526 U.S. 358 (1999)	8
United States v. *Shearer*, 473 U.S. 52 (1985)	4
Wise v. *United States*, 8 F. Supp. 2d 535 (E.D. Va. 1998)	8
Statutes:	
Federal Tort Claims Act:	
28 U.S.C. 1346(b) (1994 & Supp. V 1999)	2, 7
28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2679(a)	3
28 U.S.C. 2679(b)(1)	3
28 U.S.C. 2680	3
28 U.S.C. 2680(h)	2, 3
Miscellaneous:	
Restatement (Second) of Torts (1965)	7

In the Supreme Court of the United States

No. 00-1898

TANYA ENGLISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 238 F.3d 411 (Table). The opinion of the district court (Pet. App. 3a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2000. A petition for rehearing was denied on March 20, 2001 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on June 18, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* (1994 & Supp. V 1999), alleging that the United States negligently failed to prevent a battery upon petitioner by her husband, Michael A. English. Petitioner alleges that English, who was a Navy petty officer stationed in Chesapeake, Virginia, shot her with a gun and then turned the gun on himself and committed suicide. Pet. App. 3a-4a. The incident occurred shortly after midnight in the Englishes' off-base residence when English was off duty. Pet. 8; C.A. App. 5. Petitioner further alleges that on several occasions she requested English's supervisors to order him to undergo counseling because of his suicidal ideations, violent temper, and mood swings. Pet. App. 3a-4a. Petitioner claims that the government negligently failed to control or counsel English. *Id.* at 8a. She also argues that because English's violent outbursts led the Navy to suspend him from participating in intramural basketball games, the Navy took charge of English, so as to render it liable for negligence under Virginia law. *Id.* at 9a-10a.

The district court granted the government's motion to dismiss. Pet. App. 3a-14a. It held (*id.* at 6a-8a) that petitioner's claim was barred by the exception to the FTCA excluding coverage for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h). Alternatively, the district court held that the government was not liable under Virginia law for English's conduct because the Navy lacked a "special relation" to English that would impose a duty on it to control his behavior. Pet. App. 9a-13a.

The court of appeals affirmed on the reasoning of the district court in an unpublished opinion. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Every court of appeals that has considered the issue except the Ninth Circuit has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading that the government negligently supervised the assailant. Although a circuit split exists on this issue, the unpublished decision below does not deepen the split. Moreover, this case is not an appropriate vehicle to resolve the conflict because there is an adequate state-law ground supporting the judgment.

1. The FTCA provides the exclusive remedy for tort actions against the United States, but only to the limited extent that the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). In providing this remedy, Congress expressly barred recovery for a number of intentional torts, including "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).[1]

This Court considered the scope of the intentional tort exception in *Sheridan* v. *United States*, 487 U.S. 392 (1988). Contrary to petitioner's suggestion (Pet. 4), *Sheridan* did not hold or even suggest that a plaintiff

---

[1] Section 2680 provides, "The provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h).

may circumvent the statutory bar on recovery for injuries arising out of an assault or battery by pleading that the United States was negligent in supervising the assailant.[2] In *Sheridan*, this Court held that claims based on an independent duty, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant (1) is not a federal employee or (2) is a federal employee acting outside the scope of his employment. 487 U.S. at 400-401. Notably, the majority expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision, or training) are barred by the assault and battery exception. *Id.* at 403 n.8. In a concurring opinion, Justice Kennedy explained that he would have reached the reserved question and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. *Id.* at 408 (Kennedy, J., concurring). Thus, there is no conflict between the decision below and the decision of this Court in *Sheridan*.

---

[2] In *United States* v. *Shearer*, 473 U.S. 52, 55 (1985), the opinion of the four Justices who reached the issue specifically rejected this theory by stating that a plaintiff:

> cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

Three Justices concurred in the judgment and the remainder of the opinion, but did not join this part of the opinion. Justice Marshall concurred in the judgment only. Justice Powell took no part in the decision.

With the exception of the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* has held, consistent with the decision of the Fourth Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision. See, *e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (barring claim of negligent supervision of a Job Corps enrollee if the battery he committed occurred within the scope of his employment and government did not breach a duty unrelated to employment relationship); *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Navy serviceman because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contingent on employment relationship); *Guccione* v. *United States*, 847 F.2d 1031, 1034 (2d Cir. 1988) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not independent of employment relationship), cert. denied, 493 U.S. 1020 (1990).

These decisions are consistent with pre-*Sheridan* decisions of numerous courts of appeals. See, *e.g.*, *Thigpen* v. *United States*, 800 F.2d 393, 395-396 (4th Cir. 1986) (barring assertion of a negligent supervision

claim against United States by children who were sexually assaulted by naval hospital employee); *Hoot* v. *United States*, 790 F.2d 836, 838 (10th Cir. 1986) (dismissing suit alleging that assault occurred because of government negligence in denying soldier's request for mental examination and treatment); *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.) (holding that negligence claim arose out of excepted claim where underlying conduct, which constituted intentional tort, essential to claim), cert. denied, 479 U.S. 930 (1986); *Johnson* v. *United States*, 788 F.2d 845, 850-854 (2d Cir.) (dismissing suit alleging that assault occurred because of government negligence in employment and supervision of postal employee who assaulted infant), cert. denied, 479 U.S. 914 (1986); *Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985) (dismissing claim of negligent supervision of military recruiter who sexually assaulted a prospective recruit).

As noted, however, the Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir. 1996) (jurisdiction over negligent hiring and supervision claims); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995) (same); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986) (negligent hiring and supervision).[3]

---

[3] A separate line of cases holds that the government's negligent breach of an independent, antecedent duty to protect the victim, as distinct from a duty to control the assailant, states a claim under the FTCA. See, *e.g.*, *Bembenista* v. *United States*, 866 F.2d 493, 498 (D.C. Cir. 1989) (breach of duty to protect blind, comatose hospital patient from sexual assault); *Doe* v. *United States*, 838

2. This case is not an appropriate vehicle for this Court to resolve this conflict between the Ninth Circuit and the other courts of appeals that have considered the question. The unpublished opinion below does not contribute to the split, and an adequate state-law ground supports the judgment. The FTCA provides that the tort law of the state where the act or omission occurred governs liability. 28 U.S.C. 1346(b) (1994 & Supp. V 1999). The Fourth Circuit correctly held that even if petitioner could state a claim that was not barred by Section 2680(h), she would have no cause of action because Virginia law does not impose a duty on the Navy to control English's off-duty actions to prevent him from harming others by the battery alleged. Pet. App. 9a-13a.

Following the Restatement (Second) of Torts §§ 315, 319 (1965), the Virginia Supreme Court has held that a person ordinarily has no duty to control a third person to prevent harm to another. *Marshall* v. *Winston*, 389 S.E.2d 902, 904 (Va. 1990). This general rule does not apply, however, if there is (1) a "special relation" between the defendant and the third party which imposes a duty on the defendant to control the conduct of the third party, or (2) a "special relation" between the defendant and the plaintiff which imposes a duty on the defendant to protect the plaintiff. *Ibid.* The requisite special relation exists if the defendant takes charge of or exercises control over the third party whom he knew

---

F.2d 220, 224 (7th Cir. 1988) (breach of duty to supervise children in government daycare). Although petitioner asserts that the government breached a duty to protect her (Pet. 4), she does not contend that the government owed any special duty to her, as distinct from any other member of the public. Rather, she argues only that the government had a duty to control English to prevent him from harming anyone. See Pet. 4-9.

or should have known to be likely to cause bodily harm to another. *Nasser* v. *Parker*, 455 S.E.2d 502, 504-505 (Va. 1995). The Virginia Supreme Court has construed the "taking charge" requirement narrowly, holding that the mere existence of an employer-employee relationship does not suffice. See *Chesapeake & Potomac Tel. Co.* v. *Dowdy*, 365 S.E.2d 751, 754 (Va. 1988). See also *Fox* v. *Custis*, 372 S.E.2d 373, 376 (Va. 1988) (holding parole officers did not take charge of parolee); *Wise* v. *United States*, 8 F. Supp. 2d 535, 549 (E.D. Va. 1998) (holding government had no special relation that would give rise to duty under Virginia law to control the off-duty conduct of service members).

This Court "do[es] not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 368 (1999) (citing *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976)). Moreover, this Court generally defers to the lower federal courts' interpretations of state law. *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.").

Accordingly, the district court properly dismissed petitioner's complaint because it did not state a claim under Virginia law. That state-law ground, upheld by the court of appeals, adequately supports the judgment. Certiorari is therefore inappropriate to consider the alternative federal-law ground that Section 2680(h) bars jurisdiction over this case because it arises out of an assault or battery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
E. ROY HAWKENS
Attorneys

AUGUST 2001